IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARINE ENGINEERS' BENEFICIAL ASSOCIATION, LOCAL No. 33,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The statement of jurisdiction is set forth in the foregoing petition.

Statement of the Case

The facts are set forth in the foregoing petition and are detailed hereafter. The National Labor Relations Board is described herein as "The Board".

Summary of Argument

POINT I—The refusal of The Board to issue a complaint on facts admittedly showing a violation of the National Labor Relations Act is arbitrary and capricious and is re-

viewable by virtue of Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

POINT II—The purpose of the Act supports the view that a refusal to issue a complaint is a final order and reviewable under Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

POINT III—The case is one of first impression.

POINT IV—The complaint in the instant case was filed with The Board before the expiration of ninety days after the signing of the agreement between management and labor of which petitioner complains.

POINT I

The refusal of The Board to issue a complaint on facts admittedly showing a violation of the National Labor Relations Act is arbitrary and capricious and is reviewable by virtue of Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

The sole section of the National Labor Relations Act that treats of appeal is Section 10(f) (29 U. S. C. A., Sec. 160(f)) which reads:

> "*Any person* aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States * * *" (italics ours) (the rest of the section describes the place of the venue of the appeal and the procedure for taking that appeal).

The petitioner is an aggrieved person within the meaning of that section.

The facts:

The petitioner Labor Union charged an employer with a violation of the National Labor Relations Act and sought

redress before The Board. After reviewing the facts alleged by the Union and after an investigation, and although conceding that the facts showed the employer to be guilty of labor practices declared unfair by the National Labor Relations Act and in violation of it The Board refused to issue a complaint. Subsequently the Regional Director acting for The Board did issue a complaint. But prior to any hearing thereon The Board again reversed itself and without the consent and over the objection of the petitioner issued an official order withdrawing the complaint. The petitioner thereupon appealed to the Circuit Court of Appeals in the Second Circuit.

The Board moved to dismiss the appeal. The Court granted the motion.

The order of The Board withdrawing the complaint, or the refusal of The Board to issue a complaint in either event (1) terminates the proceeding itself, (2) operates to divest from the petitioner the rights granted by the Act, and (3) completely disposes of the subject matter and rights of the parties.

> *Johnson* v. *New York*, 48 Hun 620, 1 N. Y. Supp. 254; Black's Law Dictionary definition of "final order".

The Board has sole and exclusive jurisdiction over the rights and remedies granted by the National Labor Relations Act. Unless The Board takes jurisdiction over the matter and prosecutes it the petitioner is helpless. By such refusal The Board in its dual function as a prosecutor and as a judicial tribunal has closed its doors to petitioner.

> *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

Petitioner does not contend that every refusal to issue a complaint by The Board is reviewable. Petitioner does contend that he is entitled to have The Board act honestly and with integrity. Petitioner does contend that if The

Board's failure to act is arbitrary, or capricious, or malicious, or vicious, he must and does have the remedy of appeal.

The Circuit Court of Appeals has seen fit to base its dismissal upon two cases, namely:

> *Federal Trade Commission* v. *Klesner,* 280 U. S. 19;
> *Amalgamated Utility Workers* v. *Consolidated Edison Company* (supra).

Neither is in point.

The *Consolidated Edison* case, supra, was concerned with the National Labor Relations Act, but with an entirely different problem. Section 10(f) was not involved. There The Board had ordered the Consolidated Edison Company of New York to desist from certain labor practices. The Circuit Court of Appeals had granted The Board's petition for enforcement of its order. The Court's decree as modified was affirmed by the Supreme Court of the United States. The petitioner was the Union which sought to have the Circuit Court of Appeals adjudge the employer in contempt for failure to comply with certain requirements of the decree. The Supreme Court of the United States held that the Union had no standing and that the only complainant who could seek an enforcement of the decree was The Board itself. With this your petitioner has no quarrel.

The *Klesner* case, supra, was not concerned with the National Labor Relations Act, but with the Federal Trade Commission Act.

It is respectfully submitted that it is not proper that the construction of an Act other than the National Labor Relations Act should determine the meaning of the latter Act, especially when the language of the other Act and its purposes are entirely dissimilar. The meaning of the National Labor Relations Act and the significance of the terms used therein can be more reasonably gathered from

within the four corners of the Act itself. The National Labor Relations Act differs from the Federal Trade Commission Act and its activities so drastically that to use the Act creating the Trade Commission to determine the meaning of the National Labor Relations Act is almost beyond comprehension.

The National Labor Relations Act is concerned with great social problems affecting the relationship of employer and employee. The social, economic and industrial unrest with which it was to deal was destructive of the very life of the nation. It was concerned with bloodshed and the ruin of property.

The findings and policies of the Act are found in its Section 1 (29 U. S. C. A., Sec. 151). Its purpose was to avoid strikes and other forms of industrial strife and unrest by founding a tribunal of law and order which would protect rights and thus prevent such industrial unrest and prosecute the violators. The tribunal to administer the rights and remedies created by the Act was as important as the Act itself. If the administration of these rights and remedies by a just tribunal failed the Act might as well not have been passed. How much more important, therefore, that the administrative tribunal which supervises the rights and remedies of such vital importance should act with honesty and integrity than the ordinary administrative tribunal. If the administrative tribunal over rights as important as these fails and loses the respect of those over which it is given execlusive jurisdiction, the result is more strikes, more industrial strife, more industrial unrest and perhaps more bloodshed and destruction of property.

It is of the utmost significance, therefore, that every dispute between employer and employee within the knowledge of The Board embracing a violation of the National Labor Relations Act which alleged violation The Board has investigated and found existing should come for prosecution and decision before that Board.

POINT II

The purpose of the Act supports the view that a refusal to issue a complaint is a final order and reviewable under Section 10(f) (29 U. S. C. A., Sec. 160(f)) of the National Labor Relations Act.

The decisions in the *Consolidated Edison* case, supra, and in the *Klesner* case, supra, were dictated by a comparison with the Federal Trade Commission Act. The Federal Trade Commission Act, 15 U. S. C. A., Section 45(b) reads:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public* * * *." (Italics ours.)

The Commission was created for the interest of the public. It was a regulatory commission to prevent unfair practice in commerce injurious to the public. It had a wide discretion. The Section quoted above specifically reads

> *"if it shall appear to the commission"* (italics ours).

There were no rights created as in the National Labor Relations Act. An individual or aggrieved person if he personally were injured by an unfair action in commerce by a competitor has his redress in the common law courts. The language of that Act is entirely different from the National Labor Relations Act. The Federal Trade Act has no Section comparable to Section 10(f).

The decisions concerned with the Federal Trade Commission have unanimously held that its discretion was not reviewable and that it was required only to prosecute those claims filed with it that it felt should be prosecuted in the public interest.

Interstate Commerce Act, 49 U. S. C. A., Section 13, par. (1), entitled "COMPLAINT TO * * * AND INVESTIGATION BY COMMISSION", commences

"Any person, firm, etc. * * * ",

and the last sentence reads:

> "If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

This Act, unlike the Federal Trade Commission Act *but like* the National Labor Relations Act, creates rights and remedies that do not exist in any other jurisdictional tribunal and which would not exist but for this Act.

The Courts have held that the Interstate Commerce Commission, the tribunal set up to protect and enforce the rights and remedies created by the Interstate Commerce Act, must take jurisdiction and must prosecute a violation where their investigation indicates the violation exists.

Mitchell v. *U. S. of America,* 313 U. S. 90.

As is indicated by the two cases cited, the Circuit Court of Appeals was moved by the consideration that The Board was an administrative tribunal with wide discretion and that it was to administer the National Labor Relations Act as it thought best for the public. It is respectfully submitted that this is flying in the face of the very Act itself. The Act creates rights which do not exist anywhere else in law. These rights are vested in persons. These persons should have the right to enforce those rights, whether the person be a single employee working in a sweat shop or whether that person be the tremendous union of employees employed by a gigantic corporation. If The Board's contention were upheld or the decision of the Circuit Court were upheld The Board

could completely disregard "the little" fellow on the ground that some of the causes involving more people required prior attention, and there was no time left to treat of the complaints of the "little fellow".

The refusal to issue a complaint is a final order.

The Justices of the Circuit Court of Appeals were not impressed with The Board's argument that the refusal to take jurisdiction was not a final order. In the argument they dismissed such a contention, nor is it even mentioned in the decision of the Court. Obviously such a refusal terminates the proceeding itself, operates to divest the rights granted by the National Labor Relations Act and completely disposes of the subject matter and rights of the parties. It is not interlocutory but a definitive determination.

POINT III

The case is one of first impression.

The present proceeding is the first under Section 10-f (29 U. S. C. A., Sec. 160-f) to be brought before this Court, and for that reason alone deserves the consideration of this Court.

We respectfully urge that the decision in the Court below was erroneous in that it fails to give effect to the intent of Congress in administering the rights granted to petitioner as an aggrieved person under the National Labor Relations Act.

POINT IV

The complaint in the instant case was filed with The Board before the expiration of 90 days after the signing of the agreement of which petitioner complains between management and labor.

This is not a situation where petitioner should be precluded from relief, because the agreement complained of was in existence more than ninety (90) days before charges of unfair labor practice was filed with The Board. The record discloses that petitioner filed the charges of unfair labor practice, which is the basis of this proceeding, within a few hours after the alleged improper agreement was signed.

Furthermore the agreement between the management and employee (and it was with a single employee) was neither negotiated or signed in good faith, but for the very purpose of thwarting the National Labor Relations Act.

CONCLUSION

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

ARTHUR F. DRISCOLL,
Solicitor for Petitioner.